No. 14183

United States
COURT OF APPEALS
for the Ninth Circuit

BART McKENNEY and MARIE McKENNEY, individually and as co-partners doing business under the name of McKenney Logging Company,

Appellants,

vs.

BUFFELEN MANUFACTURING CO., a corporation,

Appellee.

EINAR GLASER, DOROTHY GLASER and McKENNEY LOGGING CORPORATION, a corporation,

Appellants,

vs.

BUFFELEN MANUFACTURING CO., a corporation,

Appellee.

APPELLANTS' BART McKENNEY AND MARIE McKENNEY PETITION FOR REHEARING

Appeals from the United States District Court for the District of Oregon

HONORABLE JAMES ALGER FEE, Chief Judge

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AUTHORITIES CITED

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PETITION OF APPELLANTS, BART McKENNEY AND MARIE McKENNEY, INDIVIDUALLY AND AS CO-PARTNERS DOING BUSINESS UNDER THE NAME OF McKENNEY LOGGING COMPANY

TO THE COURT OF APPEALS AND THE JUDGES THEREOF:

Comes now the Appellants, Bart McKenney and Marie McKenney, individually and as co-partners doing business under the name of McKenney Logging Company, in the above entitled cause and presents this, its petition, for a rehearing on the matter below men-

tioned in the above entitled cause, and, in support thereof, respectfully shows:

I.

That Paragraph (1) of the Judgment and Decree herein (p. 95 Tr.) reads as follows:

> "(1) That defendants Bart McKenney, Marie McKenney, Einar Glaser and Dorothy Glaser be and they hereby are permanently restrained and enjoined from breaching the contract with plaintiff, which is Plaintiff's Exhibit 1;"

It is submitted that such paragraph (1) constitutes the entire injunction against McKenneys and Glasers under the Decree and is violative of Rule 65 (d) of Federal Rules of Civil Procedure in that the injunction is not "specific in terms" does not "describe in reasonable detail" * * * "the act or acts sought to be restrained" and reference is made to "other document" therein.

Rule 65(d) of Federal Rules of Civil Procedure requires that an injunction shall be "specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained * * *."

In *New York, New Haven & Hartford R. R. Co. vs. Interstate Commerce Commission,* 200 U.S. 361, 26 Sup. Ct. 272, 50 L. Ed. 515, the Supreme Court said (200 U.S. 404):

> "The contention, therefore, is that, whenever a carrier has been adjudged to have violated the act to regulate commerce in any particular, it is the duty of the court, not only to enjoin the carrier from furtherlike violations of the act, but to com-

mand it in general terms not to violate the act in the future in any particular. In other words, the proposition is that, by the effect of a judgment against a carrier concerning a specific violation of the act, the carrier ceases to be under the protection of the law of the land, and must thereafter conduct all its business under the jeopardy of punishment for contempt for violating a general injunction. To state the proposition is, we think, to answer it. Swift & Co. v. United States, 196 U.S. 375, 49 L. Ed. 518, 25 Sup. Ct. Rep. 276. The contention that the cited case is inapposite because it did not concern the act to regulate commerce, but involved a violation of the antitrust act, we think is also answered by the mere statement of the proposition. The requirement of the act to regulate commerce, that a court shall enforce an observance of the statute against a carrier who has been adjudged to have violated its provisions, in no way gives countenance to the assumption that Congress intended that a court should issue an injunction of such a general character as would be violative of the most elementary principles of justice. The injunction which was granted in the case of Re: Debs, 158 U.S. 564, 39 L. Ed. 1092, 15 Sup. Ct. Rep. 900 was not open to such an objection, as its terms were no broader than the conspiracy which it was the purpose of the proceeding to restrain. To accede to the doctrine relied upon would compel us, under the guise of protecting freedom of commerce, to announce a rule which would be destructive of the fundamental liberties of the citizen."

It is submitted that the decree herein should be appropriately modified with respect to the injunctive provisions as to the defendants McKenney-Glaser either by eliminating such provisions entirely or restricting the injunction so that specific acts are forbidden thereby.

A rehearing for that purpose is respectfully requested.

II.

With respect to the affirmance of award of $118,000 against McKenneys-Glasers for loss of profits:

Even if the injunction had been limited to a mandatory provision which would require the partnership to give Buffelen the option to purchase all logs produced from the areas covered by the contract, the effect of such mandate would be to create a mixture of damages for present loss of profits with an opportunity afforded Buffelen to recoup such loss of profits within the term of the contract.

It must be remembered that the contract (Exhibit 1) covers a specific area or specific areas containing quantities and qualities of logs readily ascertainable both in quantum and quality. So that failure on the part of the McKenney partnership to offer the logs to Buffelen at a particular time does not result in an ultimate loss of profits to Buffelen. For until the timber within the specific areas covered by the contract is all harvested Buffelen can recoup the loss it now alleges to have sustained.

No time limitation for removal exists under the contract. Buffelen did not purchase the entire output of the loggers. If the partnership could have removed the timber entirely within several months after the attempted transfer to the McKenney Corporation of course, any loss of use value of the mill would be limited to such several months had the partnership failed to offer the logs to Buffelen. The right of removal of the timber as fast

as the partnership could log is not denied. It cannot be denied for such removal is permissible under the contract.

It may be rightfully assumed that during the period for which damages of $118,000 (loss of profits based upon use value of the mill) the only timber harvested from the area standing in Buffelen's name was the timber for which the claim for $50,000 was made (2,000,000 feet). It must follow that all of the rest of such timber remained for future harvesting and offering to Buffelen in obedience to the above mentioned provisions of the injunction granted against McKenneys-Glasers. From such offering of timber Buffelen had the opportunity to recoup its alleged loss of profits of $118,000. Such opportunity is absent in the usual loss of profits case.

The contract (Exhibit 1) among other things provides (p. 137 Tr.):

> "(c) It is agreed that the timber owned by the Lumber Company shall be logged at as early a date as is consistent with the efficient logging. It is contemplated that the logging operations will require approximately five years and the intention of the parties hereto is that the timber owned by the Lumber Company shall be logged within the first two years of such period and at as early a date in such two years as it can be efficiently logged, in view of the loggers' whole operation."

The contract is dated January 8th, 1948.

So that damages measured by use value resulting in an award of $118,000 becomes mere speculation and guesswork.

Since the instant case was submitted, the case of *Parker v. Harris Pine Mills* has been decided by the Oregon Supreme Court, 61 Or. Advance Sheets 743, decided Dec. 30, 1955, 291 P. 2d 709. In that case as here was a mixture of partial loss of use with a claim for entire loss of use. The Court refused to countenance recovery for complete loss of use. The Court, of course, adhered to the rule that (61 Or. Adv. Sh. 751, 291 P. 2d 731):

> "In every case actual damages sustained must be established by evidence upon which their existence and amount may be determined with reasonable certainty. Speculative damages are never allowed."

Such adherence is particularly pertinent here in view of Appellee's rather astounding statements (p. 12 Appellee's brief answering McKenneys' brief) that the Oregon rule is contrary to the State of Washington rule as stated in the Washington cases cited by McKenneys for "In Oregon, as noted by the trial court (Tr. p. 202), the courts are extremely liberal in permitting recovery of earnings lost by reason of a breach of contract."

Further the Oregon Supreme Court in *Parker v. Harris Pine Mills* said following the above quoted part of the opinion and with respect to the factual situation calling for such statement (61 Or. Adv. Sh. 751, 291 P. 2d 713):

> "Schroeder testified that needle burning of slashings would cost $1 per thousand feet of timber cut. There was no attempt to segregate the portion of the debris which might be disposed of by needle burning, the maximum required by state statute,

ORS 477.242, from that which would require hand piling in order to dispose of it. The $2. to $2.50 figure was based on hand piling. Neither was any account taken of the slashings already disposed of by the defendant, nor of the amount of debris caused by natural windfalls.

"In Porter Const. Co. v. Berry, 136 Or. 80, 93, 298 P. 179, 184, Mr. Justice Rossman, speaking for the court said,

> ' * * * A recovery cannot be based upon mere guess work, and, when compensatory damages are susceptible of proof with approximate accuracy, the necessary evidence must be supplied. 17 C.J., Damages, Sec. 90, p. 758.'

"Also see Gardner v. Dolina, Or., 288 P. 2d 796, 816; Wintersteen v. Semler, 197 Or. 601, 636, 250 P. 2d 420, 255 P. 2d 138; Becker v. Tillamook Bay Lumber Co., 194 Or. 134, 142, 240 P. 2d 237."

Gardner v. Dolina, mentioned in the immediate foregoing quotation is reported in 61 Or. Advance Sheets 237 and was decided October 26, 1955.

With respect to the attempted recovery for full loss of use when the evidence showed only partial loss of use the Court said in *Parker v. Harris Pine Mills* (61 Or. Adv. Sh. 761, 291 P. 2d 718):

> "On the trial of the instant case, plaintiff sought to establish a loss of use of the entire Stanley Creek Range of 3,600 acres for a period of two years as above noted. However, her own evidence revealed that during the time in question she ran 200 head of sheep under the control of a sheepherder on this particular land, and also 'a few head of cattle.' Thus under her own testimony, she had some use of the premises for livestock purposes during the time of which complaint is made. 'A few head of cattle' might mean anything; ten, twenty, fifty, one hun-

> dred, or two-hundred head might well be within the limits of a 'few head of cattle'."

The Court's observation "You cannot sell the cow and have the milk too" (p. 761), is peculiarly applicable to the facts in the instant case. The award of $118,000 is not supported by substantial evidence. The plaintiff has the opportunity as above shown to recoup any loss allegedly suffered through future performance by the McKenneys within the framework of the contract, which performance has been mandated by the injunctive provisions of the decree. Buffelen thereby gets the cow and the milk too.

A rehearing on the award of $118,000 damages is also respectfully requested.

Respectfully submitted,

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Attorneys for Appellants, Bart McKenney and Marie McKenney.

I, of Counsel for the above named appellants, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

DEWEY H. PALMER,

of Counsel for Appellants, Bart McKenney and Marie McKenney.